

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KEN JOHANSEN, on behalf of)
himself and others similarly)
situated,)
) Docket No. 15 C 912
Plaintiff,)
)
vs.)
)
GVN MICHIGAN, INC., doing)
business as GLOBAL VACATION)
NETWORK,)
) Chicago, Illinois
) June 5, 2015
Defendant.) 10:01 a.m.

TRANSCRIPT OF PROCEEDINGS - STATUS
BEFORE THE HONORABLE RICHARD A. POSNER

APPEARANCES:

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1 THE CLERK: 15 C 912, Johansen v. GVN, for status.

2 THE COURT: Yes.

3 MR. MURPHY: Good morning, Your Honor. Brian Murphy
4 on behalf of the plaintiff.

5 THE COURT: I'm sorry. Could you say your name
6 again? Brian --

7 MR. MURPHY: Brian Murphy.

8 THE COURT: Murphy, okay.

9 And?

10 MR. MILLER: Good morning, Your Honor. Mark Miller
11 on behalf of the defendant.

12 THE COURT: Okay.

13 So I have this, the motion to dismiss, so that -- is
14 there anything else you want to discuss besides the motion to
15 dismiss?

16 MR. MURPHY: Well, Your Honor, the one issue
17 plaintiff would like to raise is we've been trying to have a
18 Rule 26 initial meeting of the parties so that we could get
19 discovery out. The defendants -- there was some back and
20 forth in terms of who their trial counsel was going to be in
21 this matter. We would like to have some sort of schedule from
22 the Court so that it will compel them to engage in the initial
23 meeting of the parties so that we can get discovery out.

24 In these cases, Your Honor, call records are very
25 important, and sometimes those call records are in the hands

1 of third parties and not the defendant. And we're always very
2 sensitive to try to get on that as quickly as possible in the
3 discovery process so that those can be preserved and they
4 don't go away. And we can't do that, obviously, until we have
5 the initial meeting of the parties.

6 THE COURT: Mr. Miller.

7 MR. MILLER: Your Honor, Mr. Murphy is talking about
8 a discussion he had with a different lawyer who was supposedly
9 going to come in, but he's not coming in. So this is the
10 first time we've talked about it.

11 My position is I would like to have a ruling on the
12 motion to dismiss before we have the Rule 26 conference. I
13 think our Rule 26 conference should be guided by a valid
14 complaint, if one can be stated, and -- because that's going
15 to guide the discovery.

16 So I think we need to have that ruling first and then
17 have the Rule 26 conference.

18 MR. MURPHY: And, Your Honor, my belief is that, you
19 know, filing a motion to dismiss does not come with an
20 automatic stay of discovery. And so, you know, they
21 haven't -- they haven't formally asked for a stay of discovery
22 before now. And I just don't think that it's appropriate to
23 sort of -- particularly here, Your Honor, where these call
24 records can go away in an instant. You know, a lot of them
25 are electronic. And so we would like to be able to at least

1 get -- you know, to at least be able to pursue those call
2 records so --

3 THE COURT: Well, I'm expecting to rule on the motion
4 now, today, this morning, okay.

5 MR. MILLER: Okay.

6 THE COURT: Will that take care of your problem?

7 MR. MURPHY: Yes.

8 MR. MILLER: I think so.

9 THE COURT: Okay. All right. So we discussed the
10 motion to dismiss?

11 MR. MILLER: Sure.

12 THE COURT: Okay. So, Mr. Miller, what's your
13 strongest argument for dismissal?

14 MR. MILLER: Well, Your Honor, I think the strongest
15 argument is really that the plaintiff has failed to state just
16 a simple cause of action for himself for violation of a TCPA.
17 He does not allege how it was that he was able to identify the
18 first caller as GVN. He does not identify how he was able to
19 identify the second caller as GVN, except that he says that
20 after the second call, I pressed 1 in response to some sort of
21 prompt, and that later in the day, he got a call from somebody
22 identifying themselves as GVN.

23 Interestingly, later in describing other live calls
24 he received, he does recite the phone numbers. You know, it's
25 on his cell phone, so you would be able to see on your cell

1 phone what you -- who the caller is, but he doesn't recite
2 that phone number for the first two calls. And there is
3 simply no factual basis for his assertion that the first two
4 calls were from GVN. He has no -- doesn't identify what the
5 phone number is. He just doesn't allege anything other than
6 the formulaic, I got a call. And that's obviously a very
7 important element of a TCPA case, you know, what phone number
8 did you receive a call from and how do you know that the
9 person who called you was this person.

10 So you have that. You have --

11 THE COURT: Well, you have records, don't you?

12 MR. MILLER: Well, I don't know if we do have records
13 or not because these companies hire marketing companies who
14 then hire marketing companies, who hire marketing companies to
15 establish leads for -- for our company. And, you know, that's
16 kind of like asking us to prove the negative. I mean, are we
17 supposed to go to every conceivable company that could have --
18 that one of our subcontractors could have hired out -- I mean,
19 there could literally be dozens of them -- and ask them for
20 all their records? I think that's an incredibly heavy burden,
21 especially in an age where cell phone --

22 THE COURT: I don't understand that. If you call
23 them directly, then, you know, you would have a record, right?

24 MR. MILLER: If GVN called directly --

25 THE COURT: Right.

1 MR. MILLER: -- then --

2 THE COURT: But you can't, by infinite
3 subcontracting, make it impossible for anyone to figure out
4 whether you are behind these calls.

5 MR. MILLER: Well, I don't think that it's the
6 infinite subcontract.

7 THE COURT: That's how you described it. You say you
8 contracted out to someone. That person has a subcontractor.
9 You can't trace it. That sounds as if you're hiding your
10 responsibility for making those phone calls. No way you're
11 getting away from that.

12 MR. MILLER: Right. And I'm not attempting to do
13 that.

14 THE COURT: Well, then you find the records, right?
15 You're responsible for anything your subcontractors do.

16 MR. MILLER: Well, I think there's some case law that
17 really -- we get into the whole question of the responsibility
18 under the agency laws. And I think there's an open question
19 about that, to be honest with you.

20 THE COURT: What do you mean by agency laws?

21 MR. MILLER: Under the TCPA and the cases
22 interpreting it, if we didn't make the calls, and I don't
23 believe that we ever did, from what I understand about the
24 case thus far, there is a question as to whether, if a
25 subcontractor or subcontractor's contractor made that call,

1 whether we bear responsibility for it. There's all the
2 agency --

3 THE COURT: You do.

4 MR. MILLER: -- issues about control.

5 THE COURT: You do. You do. I mean, it would be
6 ridiculous otherwise, ridiculous. You are responsible for the
7 calls made on your behalf, whether made by your employees,
8 your contractors, your subcontractors, your
9 sub-subcontractors.

10 Now, if it turned out that they had acted, you know,
11 contrary to your instructions, you might have a remedy against
12 them. But you are responsible to the victims of calls made on
13 your behalf by companies with which you have contracts.
14 Otherwise you make it impossible for the plaintiffs. Then
15 they have to track down all this indefinite number of
16 subcontractors.

17 MR. MILLER: Well, Your Honor, I believe that the
18 plaintiffs have at their -- they have the ability to issue
19 Rule 45 subpoenas to subcontractors. I mean, they have other
20 tools at their disposal.

21 THE COURT: Yeah, but these are burdensome, and I
22 don't like the idea of your being able to subcontract your
23 liability.

24 MR. MILLER: Well, I think it remains to be seen if
25 these calls were made in the first place, if they were even

1 made by GVN or someone acting on GVN's behalf, because they
2 haven't alleged any basis on which they could know that. I
3 think at a very minimum they have to allege more than just,
4 you know, parroting the statute. They have to allege some
5 factual basis for knowing that GVN called them.

6 THE COURT: So this is Johansen we're talking about;
7 is that correct?

8 MR. MILLER: Yes.

9 MR. MURPHY: Yes.

10 THE COURT: Now, didn't Johansen receive or say he
11 received an advertisement about these vacation homes?

12 MR. MILLER: No, sir. What he said was he received
13 the first call -- he got a call. He doesn't say who it was
14 from, and he doesn't say that that caller identified
15 themselves as GVN.

16 Then he got a second call. Again, he doesn't
17 identify where that call came from, and he doesn't say that
18 that caller identified themselves as GVN.

19 In response to the second call, he pressed 1, which,
20 according to his complaint, meant that he was indicating
21 interest in the product. And after he pressed 1, then he got
22 a call from GVN I think the same day.

23 But we have no way of knowing, based upon his
24 complaint, how it was he was able to identify the first two
25 callers as GVN. And once he's pressed 1 and indicated his

1 interest in the product, well, then we've got whole 'nother
2 universe of issues and --

3 MR. MURPHY: No.

4 MR. MILLER: -- and -- things going on there because
5 under the TCPA, it's the second call that is the one that
6 subjects you to liability. And if he can't even allege --
7 it's not that difficult, I don't think, for him to allege in
8 his complaint either the cell phone number -- the phone number
9 of the entity that called him or that during the call that
10 party identified themselves as GVN. And he didn't do it,
11 which is particularly odd because later on in his complaint,
12 when he's talking about the other calls, he does allege what
13 number called him.

14 So I have a real problem with somebody being able to
15 just say, hey, I got two calls. I don't really know who
16 they're from. But then I got a call from GVN, so I guess the
17 first two calls must have been from GVN. GVN, I'm suing you
18 for potentially millions of dollars. I want you to produce
19 all your records, go to all your subcontractors --

20 THE COURT: He is not suing for millions of dollars.

21 MR. MILLER: Your Honor, there is potentially
22 millions of --

23 THE COURT: He is not looking for millions of dollars
24 for himself.

25 MR. MILLER: Not for himself, correct.

1 THE COURT: Right, okay.

2 So, Mr. Murphy, do you have a comment on it?

3 MR. MURPHY: Sure, Your Honor.

4 I mean, let's be clear. When it comes to these
5 caller ID numbers, when they engage in this kind of
6 telemarketing, they often use sub and subcontractors. Those
7 people are using SpoofTel or illegitimate caller ID
8 information. It's very difficult to try to track these calls
9 back to the source sometimes.

10 And so I would submit, Your Honor, that if -- for
11 instance, when I get a robocall to a cell phone, it's a
12 violation of touting, you know, vacation packages and services
13 like that. When Mr. Johansen pressed 1, he was pressing 1 to
14 try to figure out who the source of that call was. That's the
15 only ability he had, and that when, in a matter of an hour, he
16 gets a call from somebody from GVN, who he has never sort of
17 dealt with before trying to sell him vacation products, I
18 would submit, Your Honor, that that provides me a good-faith
19 basis to assert that GVN was the source of those calls. And
20 if they're not, through the course of discovery, they won't be
21 subjected to liability, but this is exactly the kind of
22 structure that they engage in. Of course when they send --
23 they know it's illegal to send you a robocall. So when they
24 send you the robocall in the vacation context or the security
25 system context, they don't say who it is. They try to be very

1 vague and ambiguous about it.

2 But I would submit, Your Honor, that we did a factual
3 investigation to make sure we knew we met our obligations as
4 counsel to make sure that we had the right defendant, and we
5 did that. And the facts laid out in the complaint are
6 sufficient to lay out a claim that survives a motion to
7 dismiss, Your Honor. Again, if this is really somebody who
8 was calling to try to sell GVN services without their
9 knowledge and, you know, against their directive, well,
10 discovery will bear that out, and they won't have any
11 liability. But as a plaintiff, it's very difficult, when you
12 have these telemarketing companies who are engaged in multiple
13 levels of subcontractors, and knowing what they're doing is in
14 violation of the law, they do things to obfuscate what they're
15 doing. And so I would submit --

16 THE COURT: Now, what discovery would you propose to
17 conduct to see whether those first two calls were on behalf of
18 GVN?

19 MR. MURPHY: Well, Your Honor, generally what we
20 would do is we try to find out from GVN who are the
21 subcontractors that they use or subagents that they use to
22 telemarket on their behalf. And then we would issue subpoenas
23 to those telemarketers to try to figure out what phone
24 numbers, what numbers are they calling from, what numbers are
25 they calling to, and, you know, how is it that these calls

1 generated to Mr. Johansen. Quite honestly, Your Honor, we've
2 been through this many times before.

3 THE COURT: Do they keep records of their calls?

4 MR. MURPHY: They do, Your Honor. Oftentimes what
5 will happen is particularly in the robocall environment,
6 they'll have systems where -- because here's what happens:
7 They need to prove to their client, their customer, that they
8 made these calls, that they delivered these messages, that
9 they generated these leads. And so that's why they'll
10 maintain those records, is because they need to prove to GVN
11 that they're the ones who called Mr. Johansen that led to him
12 signing up for their service so that they get paid. And so
13 it's our experience that, Your Honor, they're usually, quite
14 honestly, very robust call records, sometimes even including
15 complete call recordings of, you know, every robocall that was
16 made to a consumer.

17 MR. MILLER: Your Honor, I also want to mention
18 that --

19 THE COURT: Mr. Miller.

20 MR. MILLER: -- the other problem, the other deficit
21 with the plaintiff's complaint, is that they -- he hasn't
22 alleged that he did not give consent, and that is a
23 requirement under -- for stating a TCPA cause of action, the
24 lack of prior consent, whether it's prior express consent
25 before October 2013 or prior express written consent after

1 October 2013. And that's pervasive not only -- that's
2 important not only because of his individual claim but also
3 because that entire issue pervades every aspect of his class
4 action allegations, which makes it impossible for there to be
5 commonality, predominance. I mean, that raises all those
6 kinds of issues in the class action complaint.

7 And one of the problems I have here is that somebody
8 can, on such thin allegations, attempt to state a class action
9 where they are seeking to recover millions of dollars,
10 especially in the face of a statute where it's clear that
11 consent is key. And with all the different ways there are of
12 providing consent now, you know, by telephone --

13 THE COURT: Well, you're mixing up your objections to
14 the complaint. Your objections to class action are separate.

15 MR. MILLER: Well, they're separate, but we also
16 filed a Rule 12(f) motion to strike the class action
17 allegations precisely because of the inherent problems with
18 trying to state a class action under these circumstances,
19 especially given the fact that here we have a plaintiff who
20 hasn't alleged that he didn't give consent and also has a
21 pretty particular fact pattern, where he pressed 1 after the
22 second call, not knowing who the first two callers are.

23 So I think it's a case that cannot be certified as a
24 class, if we get that far, and there are district courts who
25 have, without hesitation, in the right case, stricken the

1 class action allegations at the outset of the case. And I
2 think this is one of those circumstances calling for that.

3 MR. MURPHY: Your Honor, if I might.

4 THE COURT: Yeah.

5 MR. MURPHY: Consent is an affirmative defense. It's
6 pretty clear in this district that it's an affirmative
7 defense. It's not something that I have to negate in my
8 allegations.

9 Furthermore, we did -- in fact, if you read our
10 complaint and our preliminary statement, we talk about
11 alleging that these were unsolicited calls. And I would
12 submit that when I say something is unsolicited, implicit in
13 that is that I did not give consent to receive those calls.

14 And so, Your Honor, again, when it comes to striking
15 the class allegations, this is, you know, a classic example, I
16 think, of they want to try to strike the class allegations
17 because they can promise you what's going to come next, which
18 it would be, you know, they would try to make a Rule 68 offer
19 of judgment to try to pick off the plaintiff. I would submit
20 that there's nothing in here that hasn't been decided time and
21 time again that these are appropriate class allegations. If
22 they have proof of consent for some members of the class, the
23 appropriate time to deal with that is at the time of or after
24 a motion for class certification. It's certainly not at the
25 motion to dismiss stage. And I think we don't have an

1 obligation to dispute every potential affirmative defense they
2 may have in filing our complaint.

3 THE COURT: So, Mr. Miller, do you have a second best
4 argument now? You gave the best argument. Because you have
5 several grounds that you have asked for dismissal.

6 MR. MILLER: Yeah. Well, the classes that the
7 plaintiff attempts to state are overly broad. The classes are
8 not limited to people who didn't give consent. The classes
9 are not limited to folks who were called within the last four
10 years, which is the statute of limitations under the TCPA.
11 And the classes are not limited to residential customers who
12 are the only people protected by the TCPA. So in my mind
13 right there --

14 THE COURT: But, again, these are points about the
15 class action, not about the complaint.

16 MR. MILLER: Okay. Your Honor, no. I mean, I've
17 stated them all. I think under -- I'm not a real fan, by the
18 way, of citing *Twombly* and *Iqbal* because I think they get
19 overused. But I think this is a good and very appropriate use
20 of *Twombly* and *Iqbal* because there are a pretty simple set of
21 elements of a TCPA case, but the plaintiff hasn't stated them.
22 And maybe the plaintiff can state them, but they haven't done
23 it yet. And I think until they do so, I don't think they have
24 a complaint.

25 THE COURT: Now, what are the elements you're talking

1 about?

2 MR. MILLER: The elements of a TCPA class action --
3 or cause of action are -- hang on. I just want to be sure I
4 quote them correctly.

5 All right. The elements of a TCPA class action -- or
6 claim, I'm sorry -- are that the defendant called a cellular
7 telephone number using an automated -- automatic telephone
8 dialing system and without the recipient's prior express
9 consent. And the plaintiff hasn't alleged that, that these
10 calls were made without his prior express consent. And given
11 the fact that under federal law you can consent by a
12 telephone -- pressing a key on a telephone, responding to an
13 e-mail, responding to a text, voice -- some sort of voice
14 affirmation, either with an entity or one of its affiliated
15 companies, that's a really important element. That's a really
16 important element. And I think at the very least the
17 plaintiff ought to be required and the cases say the plaintiff
18 is required to plea that.

19 Now, there are some cases which say, well, no, that's
20 more of an affirmative defense, but those cases are based upon
21 an FTC decision that was specifically about the
22 creditor/debtor relationship. And that creditor/debtor
23 relationship and those attributes which pertain to a different
24 FCC exception to the TCPA laws for debtors, creditors, for
25 folks trying to collect on a debt, don't have any application

1 in this circumstance.

2 MR. MURPHY: Your Honor, in this district, *Charvat v.*
3 *Allstate*, 29 F. Supp. 3d 1147, it's a TCPA case, said very
4 specifically, you know, affirmative defense is not an element
5 of plaintiff's claim. Consent is an affirmative defense.

6 And I would go back to, Your Honor, we don't even
7 need to get there because when I allege something is
8 unsolicited, to me that says that I didn't give consent. I
9 don't think there's -- you know, this is really I think much
10 ado about nothing in terms of if they claim -- this is real
11 simple, too, Your Honor. If they have the necessary consent
12 for our client, once the motion to dismiss is decided, they
13 certainly haven't provided it to us yet. I would have thought
14 as soon as I filed a complaint, if the defendant had prior
15 express consent of my client, they would produce that pretty
16 quickly. And as a lawyer, I would take that into account on
17 what to do next. They don't have any evidence that they, in
18 fact, have such a thing.

19 So I think we've adequately pled a TCPA claim. And
20 to the extent they have an affirmative defense that they want
21 to prosecute, they certainly are free to do that.

22 MR. MILLER: Your Honor --

23 THE COURT: Mr. Miller, what's the difference between
24 unsolicited and lack of --

25 MR. MILLER: Well, in the first place, I'm trying to

1 find where they allege in their complaint that the calls were
2 unsolicited.

3 MR. MURPHY: It's in the very introduction to the
4 complaint, the preliminary statement.

5 MR. MILLER: Someone is going to have to point that
6 out to me.

7 MR. MURPHY: Your Honor, we say they operate a series
8 of travel memberships. They contacted plaintiff on his
9 cellular telephone using illegal automated equipment and
10 prerecorded technology, despite the fact that the plaintiff
11 was on the National Do Not Call Registry. Your Honor, that, I
12 believe, would be enough to express that the plaintiff did not
13 consent to these calls.

14 Plaintiff goes on, in order to redress these
15 injuries, plaintiff, on behalf of himself and the proposed
16 class of similarly situated individuals, bring this suit under
17 the TCPA, which specifically prohibits unsolicited prerecorded
18 voice calls.

19 MR. MILLER: But, Your Honor, where has he -- all
20 he's saying is that the statute prohibits unsolicited calls.
21 We get that. But where has he alleged that the calls made to
22 him by GVN were unsolicited? It's not here.

23 MR. MURPHY: Your Honor, I would submit --

24 MR. MILLER: And he has not pled a cause of action,
25 by the way, under the Do Not Call Registry. Or maybe he has.

1 It's kind of hard to tell because all -- if you look at his
2 complaint, when you get to his personal counts, all he says is
3 plaintiff incorporates all the paragraphs before this, and
4 that constitutes a violation of the TCPA. I mean, how about a
5 little more specificity. Is he talking about the Do Not Call
6 regulations? Is he talking about that you called me on a cell
7 phone? Is he talking about you called me on a residential
8 business number or a landline? On top of which he's got
9 separate counts, individual counts, for willful versus
10 negligent violation of the TCPA, and willfulness is just a
11 measure of damages. It's not a separate cause of action.

12 So there are a lot of problems with this complaint.
13 And, frankly, it's not that difficult, with all due respect, I
14 mean it in the nicest way --

15 THE COURT: I don't understand. He receives
16 prerecorded messages, and he doesn't know who it is, so he
17 presses 1. And then he receives a call from GVN; is that
18 correct?

19 MR. MURPHY: Yes, Your Honor.

20 THE COURT: Well, obviously then the call came from
21 GVN or one of its subcontractors.

22 MR. MILLER: Your Honor, with all due respect, I
23 don't see how that follows.

24 THE COURT: Oh, come on.

25 MR. MILLER: I just don't.

1 MR. MURPHY: There's a reason --

2 THE COURT: Well, you're wrong, because you receive a
3 call. You don't know what it's from. You press 1 to try to
4 find out who it's from. And the next thing you know, you get
5 a call --

6 MR. MURPHY: Regarding the same topic, Your Honor.

7 THE COURT: -- from GVN, right?

8 MR. MURPHY: Right.

9 THE COURT: So put two and two together and you get
10 four, right?

11 MR. MILLER: I don't --

12 THE COURT: What do you think happened? Why did GVN
13 make this call to him?

14 MR. MILLER: Your Honor, I don't know. I don't know
15 that GVN called him.

16 THE COURT: Ever?

17 MR. MILLER: I don't know that anybody that was
18 working for GVN or was their agent called him. I don't have
19 any --

20 THE COURT: I mean, the allegation is GVN placed
21 another call to a cellular phone claiming to be from GVN
22 offering the plaintiff a free vacation. Now, that's an
23 allegation. Do you have evidence that that's false?

24 MR. MILLER: Well, this -- I don't -- in the first
25 place, he's talking about what happened after he pressed 1 --

1 THE COURT: Yes, but he says --

2 MR. MILLER: -- which to GVN indicates --

3 THE COURT: -- he pressed 1 in order to find out who
4 was pestering him. That's his allegation. Now, he may be
5 wrong. He may be lying. But that's all you need in a
6 complaint, is allegations.

7 MR. MILLER: Whatever happens after he presses 1,
8 he's already given his consent.

9 THE COURT: Oh, come on. If his purpose in pressing
10 1 --

11 MR. MILLER: It doesn't matter --

12 THE COURT: Don't interrupt me.

13 If his purpose in pressing 1 is simply to find out
14 who's calling him, he's not giving consent to anything.

15 MR. MILLER: Under the ESIGN Act, he has given
16 consent.

17 THE COURT: Look, what you're saying is totally
18 illogical. He alleges that he pressed it not because he
19 wanted to do business with GVN but because he doesn't know who
20 is calling him. Now, if that's true, right, that has nothing
21 to do with consent. Now, how can you say it's false?

22 MR. MILLER: I don't know whether or not he pressed
23 1. I don't know that. But I do know --

24 THE COURT: It's an allegation.

25 MR. MILLER: I --

1 THE COURT: So what are you going to do about that?
2 You don't seem to understand what a pleading is about. A
3 pleading is about allegations. It's not about proof.

4 Look, your motion is frivolous. I am denying it. I
5 will explain why I'm denying it. So let's go on -- so what's
6 next? Okay. What comes next in this proceeding? We're
7 through the motion.

8 MR. MURPHY: Your Honor, I think we would like to set
9 a case schedule so that we can -- again, so that we can have
10 this Rule 26 conference and we can get moving on discovery as
11 quickly as possible, Your Honor.

12 THE COURT: Okay. Well, what are you suggesting
13 about a schedule?

14 MR. MURPHY: Your Honor, I think typically we would
15 be looking for, you know, six to seven months for fact
16 discovery on that just because generally we can get our
17 discovery out pretty quickly, subpoenas out pretty quickly,
18 but sometimes when we're dealing with subcontractors and
19 sub-subcontractors, we don't know. They may be New Jersey.
20 They may be in California, and sometimes that process takes
21 longer than 30 or 60 days. But we generally think, you know,
22 in the six- to nine-month range for fact discovery is all we
23 typically need in these cases, and then, you know, setting a
24 class certification schedule for sometime thereafter.

25 MR. MILLER: That sounds fine, Your Honor.

1 THE COURT: Mr. Miller?

2 MR. MILLER: That sounds fine.

3 MR. MURPHY: Your Honor --

4 THE COURT: Is there anything else I should do except
5 set that schedule?

6 MR. MURPHY: Your Honor, there may be -- as I think
7 about it, in some instances, we may need expert discovery in
8 these cases depending on the technology that's used. And so,
9 you know, preferably there would be some short provision for
10 expert discovery at the conclusion of fact discovery.

11 THE COURT: Have you had any settlement discussions?

12 MR. MURPHY: No, Your Honor, not at this point.

13 MR. MILLER: No, Your Honor.

14 THE COURT: I mean, these cases are almost always
15 settled.

16 Is there anything else you want to discuss?

17 MR. MURPHY: Not from the plaintiff, Your Honor.

18 MR. MILLER: No. I mean, I think in terms of
19 settlement, one of things that may be an impediment is that,
20 as Your Honor probably knows, the Supreme Court has agreed to
21 rule on whether -- if an offer of judgment is made, whether
22 that will essentially moot the class proceedings, but they
23 won't be deciding on that until next June sometime.

24 MR. MURPHY: Yeah. And, Your Honor, I would argue in
25 this district, the law is pretty clear in terms of what the

1 Supreme Court may or may not decide. There are other issues
2 in that cert that may have nothing to do with that. And I
3 would submit that that's why we have every incentive and want
4 to move this case along as quickly as possible, because, you
5 know, defendants may think that the law is going to move in
6 their favor, but I would submit if it doesn't --

7 THE COURT: This is where Supreme Court has granted
8 cert in the case?

9 MR. MURPHY: Well, it's *Campbell Ewald* I believe is
10 the name of it.

11 THE COURT: What is it called?

12 MR. MURPHY: *Campbell Ewald*.

13 THE COURT: *Campbell*?

14 MR. MURPHY: I think that's it, right?

15 MR. MILLER: I don't want to --

16 MR. MURPHY: And, Your Honor, it has to do with
17 Rule 68 offers of judgment in the class context.

18 THE COURT: The picking off problem?

19 MR. MURPHY: Exactly, exactly. But it's in a case in
20 California where there are also sort of sovereign immunity
21 issues because the TCPA claim in that case involved the Navy.
22 And so there are three questions up for cert. One of them is
23 the sovereign immunity question, which would sort of -- it may
24 not get to what everybody thinks they're going to get to.

25 THE COURT: Anything further?

1 MR. MURPHY: Not from plaintiff, Your Honor.

2 THE COURT: Well, thank you very much, both.

3 We'll be in recess.

4 (Which were all of the proceedings had.)

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9 I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.

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11 /s/ Kelly Fitzgerald July 14, 2015
Official Court Reporter

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